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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ROBERT CATALANO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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INDEX

	PAGE
Opinion below	2
Jurisdiction of this Court	2
Questions Presented for Review	2
Constitutional Provisions Involved	3
Statement of the Case	4
Reasons for the Allowance of the Writ	7
I. Where defendant waives a jury without realizing what the consequences were, but before trial demands a jury, was it not a deprivation of his constitutional right under the Sixth Amendment to the Constitution as implemented by the Fourteenth Amendment to deny him the right to a jury trial?	7
II. Petitioner's constitutional right to have effective assistance of counsel was denied.	10
Conclusion	13
Appendix A—Opinion	App. 1
Appendix B—Sixth Amendment to the Constitution of the United States	App. 8

AUTHORITIES CITED

Cases

	PAGE
Douglas v. California, 372 U.S. 353	12
Gideon v. Wainwright, 372 U.S. 335	12
Glasser v. United States, 315 U.S. 60, 76	9, 12
Johnson v. Zerbst, 304 U.S. 458, 464	9
Pattor v. United States, 281 U.S. 276 at 312	7
People ex rel Swanson v. Fisher, 340 Ill. 250, 265	9
United States ex rel. Foley v. Ragen, D.C. Ill. 1943, 52 F. Supp. 265	12

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Robert Catalano respectfully prays that a Writ of Certiorari be issued to the Supreme Court of Illinois to review its decision affirming a judgment of conviction in the Criminal Court of Cook County, Illinois, adjudging petitioner guilty of obtaining unauthorized control of two automobiles knowing the same to have been stolen by another and sentencing him to a term of one to five years imprisonment.

OPINION BELOW

Trial was had to the court without a jury; no written opinion was delivered.

The opinion of the Supreme Court of Illinois is set out at pp. 11 to 15 of the record filed herein, is reported in 29 Ill. 2d 197, and is reprinted in this petition as Appendix A. The court below also denied a petition for rehearing (R. 18-19).

JURISDICTION OF THIS COURT

1. The date of judgment sought to be reviewed was entered September 27, 1963 (R. 10). The petition for rehearing was denied on November 25, 1963 (R. 19). This petition for a writ of certiorari is filed within ninety days of the denial of the petition for rehearing.

2. This court's jurisdiction is invoked under Title 28, United States Code, Section 1257(3) and Rule 22(1) of the rules of this court.

QUESTIONS PRESENTED FOR REVIEW

1. Where the defendant demanded a trial by jury and advised the court that his execution of a written jury waiver made a month before was not made understandingly and was made without realization of the consequences, was it not a violation of the Sixth Amendment to the Constitution of the United States for the State to try him without a jury?

2. Was the defendant denied his right to have effective assistance of counsel for his defense, as laid down by the Sixth Amendment to the Constitution, when defense counsel advised the trial judge that he wanted nothing to do with the case, that he didn't want to defend the defendant, that he was "embarrassed" to present motions requested by defendant and that he could not represent the defendant in the frame of mind that counsel was in, but yet the court denied leave of counsel to withdraw.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE:

Petitioner was charged in two separate indictments with obtaining unauthorized control of an automobile, knowing the same to have been stolen by another (R. 3, p. 1)[1]. The defendant was found in possession of one of the automobiles and had sold the other (R. 3, pp. 7-14). As to the car that was sold, the defendant presented evidence that he purchased the car without knowledge of its contraband character (R. 3, p. 15); and with respect to the other car, he presented evidence that it belonged to a Dr. Charles Meyers, a physician, who loaned the car to defendant (R. 3, pp. 19-20).

Petitioner was arraigned on May 29, 1962 (R. 3, p. 1). On June 29, 1962, defense counsel advised the court that ". . . Actually Judge, there is a little discrepancy here between my feelings and my client's feelings, but I think we are going to be able to dispose of this the next time up . . . This will definitely be a bench trial." (R. 3, p. 3).

At that time there was an agreement between the State's Attorney and the defense counsel to stipulate as to the ownership of the automobiles in order to accommodate two state's witnesses, the owners of the automobiles, in order that they would not have to come back to court (R. 3, p. 3). The stipulations were then entered into the record with respect to the ownership of the two automobiles in question (R. 3, pp. 3-4).

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[1] "R" refers to the Record as filed in this court; the pages indicated refer to the printed material found at the Record page-number.

Whereupon the cause was continued to July 26, 1962 (R. 3, p. 4).

On that date defense counsel advised the court that to his "great embarrassment" the defendant requested of the lawyer to file a petition for a change of venue. Defense counsel further advised the court that he and his client . . . "can't come to agreement as to how this matter should be handled." (R. 3, p. 4). The court replied that on June 29 an order was entered as follows:

> "The parties present: Plea of not guilty heretofore entered. Defendant advised as to his right to trial by jury; waived jury; signed jury waiver. Testimony was heard by stipulation, in part. Defendant moved for a presentence investigation by the Probation Department and cause was continued." (R. 3, p. 4).

Defense counsel advised the court that although defendant waived a jury before, "He didn't realize what the consequences were." (R. 3, p. 5).

Then the following occurred:

> "The Court: Your request for a jury trial will be denied.
>
> I think the record should reflect that is all brought about to me [*sic.*] by your advices in chambers this morning.
>
> Mr. Caplan: No, I have nothing to do with it. I don't want to be in this matter. I don't want to have anything to do with it. I don't want to defend this man.
>
> The Court: Not less than 15 minutes ago you came into my chambers and wanted to talk about this case

Mr. Caplan: That had nothing to do with it.

The Court: (continuing) in the absence of the State's Attorney.

Mr. Caplan: It had nothing to do with this matter. He comes in here today and tells me he wants a jury. He tells me he doesn't want to enter a plea, and now he has witnesses that aren't here. I told him I don't want to handle the case. He doesn't want me in it.

The Court: Your motion—

Mr. Caplan: In the frame of mind I am in with the defendant, he told me to get a change of venue and I said, 'I'll get you a change of venue but I will withdraw at the same time.'—This is very embarrassing to me. I don't want anything to do with the matter. I have received a retainer and I am willing to give him back his money. The retainer I received wasn't very much. I am willing to give it back. I can't represent this man in the frame of mind I am in, Judge. I don't think I want anything to do with it.

The Court: I can't help but feel, Mr. Caplan, you imposed on this court by coming into my chambers this morning in the absence of the State's Attorney and desiring to talk about what disposition the court intended to make of this case if there was a finding of guilty.

Your petition for a change of venue will be denied; your motion for a continuance will be denied.

Mr. Caplan: Could I withdraw your Honor?

The Court: No you cannot withdraw. You will go to trial right now."

REASONS FOR THE ALLOWANCE OF THE WRIT

I.

WHERE DEFENDANT WAIVES A JURY WITHOUT REALIZING WHAT THE CONSEQUENCES WERE, BUT BEFORE TRIAL DEMANDS A JURY, WAS IT NOT A DEPRIVATION OF HIS CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION AS IMPLEMENTED BY THE FOURTEENTH AMENDMENT TO DENY HIM THE RIGHT TO A JURY TRIAL?

The due process clause of the Fourteenth Amendment to the Constitution was violated when the State of Illinois tried the defendant on a felony charge without granting him the right to trial by jury, as required by the Sixth Amendment to the Constitution. The holding in *Patton v. United States*, 281 U.S. 276 at 312 is applicable here. The court stated,

> "Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously reserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant and the duty of the trial court in that regard is not to be discharged as a mere mat-

ter of note, but with sound and advised discretion, and with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

The Supreme Court of Illinois decided, "While a defendant has the right to a trial by jury, once he has voluntarily elected to waive that right he cannot thereafter withdraw his waiver as a matter of right. Whether the accused will be permitted to withdraw the waiver is ordinarily within the discretion of the trial court unless the circumstances indicate that the defendant did not realize the consequences of his jury waiver." (R. 13-14; Appendix A).

But counsel advised the court that the defendant did not waive the jury understandingly as the defendant did not realize what the consequences were (R. 3, p. 5). The intelligent consent of the defendant was not ascertained by the court at the time when the defendant signed the jury waiver. Counsel advised the court that ". . . this will definitely be a bench trial" on June 29, 1962 (R. 3, p. 3). The defendant signed a jury waiver. But the court did not inquire of the defendant at that time whether he voluntarily and understandingly waived a jury. The record of proceedings taken on June 29, 1962, contains no admonishment from the trial court to the defendant directly. Rather, an order was entered on the clerk's docket to the effect that the "defendant advised as to his right to trial by jury; waived jury; signed jury waiver." (R. 3, p. 4). But the conclusion, "defendant advised as to his right to trial by jury" is without foundation in the record which disclosed only that defense counsel advised the court the trial would be a bench trial. When the defendant appeared next before the court, his counsel advised the court that defend-

ant did not realize what the consequences were when he signed the jury waiver. The court should have held a hearing to determine whether there was an understanding waiver of the jury.

It would seem that the State of Illinois is even departing from its own earlier case of *People ex rel Swanson* v. *Fisher*, 340 Ill. 250, wherein the court said, p. 265:

> "Upon the trial court is imposed the duty to see that an accused person's election to forego such a trial is not only expressly, but also understandingly made. The performance of that duty involves a responsibility which cannot be perfunctorily discharged."

In advance of petitioner's request to have a jury trial, he moved the court for a change of venue, which petition was denied (R. 3, p. 4). Petitioner, through counsel asserted that, "... he became aware of a certain situation where he feels that court may be prejudiced against him." In view of the charge of prejudice by the court, and considering that it was asserted before the trial began that defendant did not waive his right to a jury trial understandingly, it would have been more in accord with fair standards of criminal justice to have granted the defendants a jury trial. The deprivation to the defendant has been demonstrated.

Furthermore, the right to trial by jury, like the right to have the assistance of counsel, is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U.S. 60, 76. The court indulges in every presumption against a waiver of fundamental constitutional rights". *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

Under all the circumstances here, the withdrawal of the jury waiver should have been allowed.

II.

PETITIONER'S CONSTITUTIONAL RIGHT TO HAVE EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED.

Under the circumstances of this case the court should have permitted defense counsel to withdraw when counsel advised the court that his client so requested. Counsel advised the court on June 29, one month after arraignment that ". . . actually judge, there is a little discrepancy here between my feelings and my client's feelings." (R. 3, p. 3). The case was continued on June 29 to July 26, 1962 (R. 3, p. 4). Defense counsel was "embarrassed" to present to the court the petition of the defendant for a change of venue, based upon alleged prejudice (R. 3, p. 4). Counsel stated to the court, "He (the defendant) states that today he became aware of a certain situation where he feels that this court may be prejudiced against him. Also, it may be necessary for me to withdraw at this time and let him get another attorney to represent him. It seems we can't come to an agreement as to how this matter should be handled." (R. 3, p. 4). When the lawyer overcame his "embarrassment" and presented his motion for a change of venue which was denied, counsel asked leave of court to withdraw his appearance on behalf of the defendant. That motion too was denied. Counsel advised the court the defendant told him that he wished a jury trial and that although the defendant waived a jury trial at a prior hearing that, "He didn't realize what the consequences were." (R. 3, p. 5).

In denying the defendant's request for a jury trial the court stated, "I think the record should reflect that is all brought about by your advices to me in chambers this morning." (R. 3, p. 5). Whereupon the defense lawyer stated he did not want to be in this matter and wanted nothing to

do with it. "I don't want to defend this man." Counsel further said, "He comes in here today and tells me he wants a jury. He tells me he doesn't want to enter a plea, and now he has witnesses that aren't here. I told him I don't want to handle the case. He doesn't want me in it. . . . In the frame of mind I am in with the defendant, he told me to get a change of venue and I said 'I'll get you a change of venue but I will withdraw at the same time.' This is very embarrassing to me. I don't want anything to do with the matter. I have received a retainer and I am willing to give him back his money. The retainer I received wasn't very much. I am willing to give it back. I can't represent this man in the frame of mind I am in, Judge. I don't think I want anything to do with it." (R. 3, p. 5). Whereupon, the court denied counsel's motion to withdraw as lawyer in the case and compelled him to proceed to trial.

Where a lawyer demonstrates a conflict between himself and his client as to how to handle the case, where the lawyer is "embarrassed" to present petitions within the permissible allowances of the law, where the lawyer was not in a frame of mind properly to represent the defendant, where the lawyer represented that he and his client could not come to an agreement as to how the case should be handled, and where the lawyer several times stated, "I don't want to be in this matter. I don't want to have anything to do with it. I don't want to defend this man." (R. 3, p. 5), and where the client did not want the lawyer in the case either, it does not comport with fair standards of criminal procedure to require a lawyer, under such circumstances, to continue to defend a man whose differences were such as to prevent the lawyer from being completely fidelitous to his obligation to defend a client without any feeling of reticence, compunction or embarrassment.

The necessity for counsel was recently reaffirmed in *Gideon* v. *Wainwright*, 372 U.S. 335 and *Douglas* v. *California*, 372 U.S. 353, and the constitutional mandate of the Sixth Amendment to have the "assistance of counsel" means the effective assistance of counsel, unwavering and loyal to the client's cause.

The right of accused to assistance of "counsel" means that the accused is entitled to the good faith assistance of a lawyer in defending the accused against the indictment upon which he is put to trial. *United States ex rel. Foley* v. *Ragen*, D.C. Ill. 1943, 52 F. Supp. 265.

So here, where counsel entered the trial with reluctance and without any confidence by the defendant in his counsel and where counsel was not "of a proper frame of mind" to represent the defendant, where he wanted nothing to do with the defendant or the case, it does not require much speculation to conclude that defendant was denied effective assistance of counsel. Again, *Glasser* v. *United States*, 315 U.S. 60, 76 is appropriate. The right to counsel is ". . . too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The Supreme Court of Illinois opined that because counsel's motion to withdraw was made on the very day of trial, after one continuance had been granted, that an additional continuance would have been required in order to permit the defendant to obtain another lawyer for the trial (R. 15; Appendix A). The Supreme Court of Illinois felt this factor superseded defendant's constitutional right to the effective assistance of counsel.

We respectfully submit that under the circumstances of this case, the trial court abused its discretion in denying defense counsel's motion for leave to withdraw as counsel.

CONCLUSION.

We respectfully submit that when two such important constitutional privileges—the right to be tried by a jury and the right to the effective assistance of counsel—have been abrogated, that your Honors will consider this a fit case to warrant the court's attention. Accordingly, we pray that your Honors will allow the petition.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX A

Docket No. 37717—Agenda 72—May, 1963.
The People of the State of Illinois, Defendant in Error, v. Robert Catalano, Plaintiff in Error.

Mr. JUSTICE SOLFISBURG delivered the opinion of the court:

On July 26, 1962, the defendant, Robert Catalano, was tried in the criminal court of Cook County before the court without a jury on two indictments: the first alleging unauthorized control of a stolen automobile, and the second alleging theft of another motor vehicle. He was found guilty on both indictments and sentenced to the Illinois State Penitentiary for concurrent terms of not less than one nor more than five years. He prosecutes this writ of error to review his conviction.

The defendant contends that the trial court erred by denying the defendant a change of venue, refusing to permit the defendant to withdraw a jury waiver, and by refusing to permit the defense counsel to withdraw. Defendant also contends that the evidence was insufficient to sustain the allegations of either indictment.

In order to properly evaluate the first three alleged errors it is necessary that we consider the chronology of events in the trial court leading up to the motions for change of venue, for withdrawal of the jury waiver, and for leave to withdraw by defense counsel.

On May 29, 1962, the defendant was arraigned, entered a plea of not guilty, and the case was assigned to a trial judge. He was represented by an attorney of his own choice on this date and during all subsequent proceedings. On June 29, 1962, the case came up for trial, and the defendant's attorney requested a continuance. Defendant's coun-

sel had not advised the State's Attorney in advance of his intention to request a continuance, and the State asserted that they were ready for trial and that their witnesses were present. At this time, the defendant's counsel entered into a stipulation with regard to the testimony of the owners of the two automobiles in question. In discussing the case defendant's counsel stated, "This will definitely be a bench trial", and the defendant signed a jury waiver. The defendant also moved for a presentence investigation by the probation department, and on defendant's motion the cause was continued.

On July 26, 1962, this cause came on for trial. At this time the defendant made his motion for a change of venue, which was denied. The following discussion then took place:

> "Mr. Caplan: Judge, at this time I would like to ask leave of the Court to withdraw my appearance on behalf of this Defendant.
>
> "The Court: That motion will be denied also. You will have to go to trial, I am afraid.
>
> "Mr. Caplan: Also, the Defendant now tells me that he now wishes a jury trial. He did waive a jury, before. He didn't realize what the consequences were.
>
> "The Court: Your request for a jury trial will be denied, Mr. Caplan. I think the record should reflect that is all brought by your visit to me in chambers this morning.
>
> "Mr. Caplan: No, I have nothing to do with it. I don't want to be in this matter. I don't want to have anything to do with it. I don't want to defend this man.
>
> "The Court: Not less than fifteen minutes ago you came into my chambers and wanted to talk about this case—

"Mr. Caplan: That had nothing to do with it.

"The Court: (continuing)—in the absence of the State's Attorney.

"Mr. Caplan: It had nothing to do with this matter. He comes in here today and tells me he wants a jury. He tells me he doesn't want to enter a plea, and now he has witnesses that aren't here. I told him I didn't want to handle the case. He doesn't want me in it.

"The Court: Your motion—

"Mr. Caplan: In the frame of mind I am in with the Defendant, he told me to get a change of venue and I said, 'I'll get you a change of venue but I will withdraw at the same time'—this is very embarrassing to me. I don't want anything to do with the matter. I have received a retainer and I am willing to give him back his money. The retainer I received wasn't very much. I am willing to give it back. I can't represent this man in the frame of mind I am in, Judge. I don't think I want anything to do with it.

"The Court: I can't help but feel, Mr. Caplan, you imposed on this Court, by coming into my chambers this morning in the absence of the State's Attorney and desiring to talk about what disposition the Court intended to make with this case if there was a finding of guilty.

"Your petition for a change of venue will be denied; your motion for a continuance will be denied.

"Mr. Caplan: Can I withdraw, your Honor?

"The Court: No, you cannot withdraw. You will go to trial, right now."

It is apparent that all of the motions in issue were made by the defendant's counsel only after he had approached the trial judge in chambers, in the absence of the State's Attorney, to discuss the disposition the court intended to

make of there would be a finding of guilty. Apparently, after ascertaining the attitude of the judge, defense counsel then made a motion for a change of venue. This being denied he made a motion to disdraw the jury waiver and finally to withdraw as counsel for the defendant.

" It has often been said that if a petition for change of venue on account of the prejudice of the judge is in compliance with the statute (Ill. Rev. Stat. 1961, chap. 146, par. 18), the right of the defendant to a change of venue is absolute. However, it has also been held by this court that when it is apparent that the request is made only to delay or avoid a trial its denial does not constitute error. *People* v. *Beamon*, 24 Ill.2d 562.

The law requires a petition for change of venue to be filed at the earliest practical moment. This requirement is designed in part to preclude counsel from first ascertaining the attitude of the trial judge and then, if the court's judgment is not in harmony with counsel's theory, to assert the prejudice of the court as a ground for allowing a change of venue. The present case is similar to *People* v. *Chambers*, 9 Ill.2d 83, wherein the motion for change of venue was not presented until after the court had heard a motion to suppress evidence, and ruled adversely thereon, prior to the commencement of the trial. In the case of *People* v. *Beamon*, 24 Ill.2d 562, the motion for change of venue was made after the defendant's belated request for substitution of counsel had been denied and after he had been informed of a result of a conference between his attorney and the State's Attorney, the case having been set for trial for some time before the same judge and continued previously at the defendant's request. In both of these cases the trial court denied the motion for change of venue and the rulings were affirmed by this court.

We think that under the circumstances present in this case the court did not err in denying the motion for change of venue.

While a defendant has the right to a trial by jury, once he has voluntarily elected to waive that right he cannot thereafter withdraw his waiver as a matter of right. Whether the accused will be permitted to withdraw the waiver is ordinarily within the discretion of the trial court unless the circumstances indicate that the defendant did not realize the consequences of his jury waiver.

There is authority for the proposition that a trial court should allow a waiver of jury trial to be withdrawn on timely application when such waiver was made by the defendant without advice of counsel and the motion for withdrawal of the waiver was made after employment of counsel. (Anno: 46 A.L.R. 2d 919, 928.) In the present case, however, defendant was represented by counsel of his own choice at all stages of the proceedings and it is presumed that this counsel fully advised him of his rights. The defendant's attorney in the defendant's presence informed the court that this definitely would be a bench trial. The written jury waiver signed by the defendant clearly stated that he agreed to a trial by the court. Further, the court's order of June 29, 1962, recites that the defendant had been advised by the court as to his right to trial by jury and that he waived jury and signed the jury waiver. We think it is clear under these circumstances that the defendant realized the consequences of his jury waiver.

The question of whether a defendant's motion for withdrawal of a jury waiver is timely made is of a two-fold nature. It involves the question of whether such motion may be made after the commencement of the trial and it also involves the question whether such motion, although

made prior to the actual commencement of trial, was made at a time when the granting thereof would result in delay of the trial, would impede justice or prejudice the State, or would inconvenience the witnesses. On the first question the authorities are uniform to the effect that a motion for withdrawal of waiver made after the commencement of the trial is not timely and should not be allowed. There is considerable discussion in the present case as to whether or not the trial had already "commenced" by the defendant's stipulation to the testimony of the two owners of the automobiles. Even if this motion was made prior to the commencement of trial, there is no question but that it would have delayed the trial, possibly prejudiced the State and inconvenienced the witnesses. The trial had already been continued once on motion of the defendant and the present motion to withdraw the jury waiver was presented for the first time after the defense attorney had discussed with the trial judge the possible sentence on a finding of guilty. Under all the circumstances of this case, what we have said as to timely application for change of venue applies equally as well here. It is our opinion that the trial court did not err in denying the motion to withdraw the jury waiver. *People* v. *Palmer*, 27 Ill.2d 311; *People* v. *King*, 30 Ill. App.2d 264.

The motion by an attorney for leave to withdraw for any reason is also addressed to the sound discretion of the court. For that reason, a burden rests with the moving party to prove to the court's satisfaction the legitimacy of the request, or the court may properly deny the motion. (*People* v. *Wolff*, 19 Ill.2d 318; *People* v. *Franklin*, 415 Ill. 514; *People* v. *Dolgin*, 415 Ill. 434.) In the case at bar it is important to note that the defense counsel's oral motion to withdraw was made on the very day of trial after the defendant had stipulated to the testimony of two witnesses,

secured a prior continuance of trial, and after the conference between the defense counsel and the judge with regard to sentence. It was also subsequent to the denial of the defendant's motions for change of venue and withdrawal of jury waiver. If granted, an additional continuance would have been required so that defendant could obtain other counsel and to enable the new attorney to prepare for trial. It should also be noted that the record indicates no lack of cooperation between defendant and his attorney subsequent to the denial of the motion to withdraw. Under the circumstances we do not feel that the trial court abused its discretion in denying defense counsel's motion for leave to withdraw.

Defendant's last contention is that he was not proved guilty beyond a reasonable doubt. The gist of his contention appears to be that there is insufficient proof that the two automobiles in the possession of defendant were the same as those referred to in the indictments and stolen from the complaining witnesses.

We have carefully analyzed the record, including the stipulation of counsel relating to the ownership of the automobiles. These stipulations were further strengthened by testimony of admissions of the defendant. From the record we are convinced that the burden of proving the ownership of the automobiles in the possession of the defendant was sustained and the defendant proved guilty beyond a reasonable doubt. *People* v. *Hawkins*, 27 Ill.2d 339; *People* v. *Hare*, 25 Ill.2d 321.

The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.

APPENDIX B

Sixth Amendment to the Constitution of the United States

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state . . . and to have the Assistance of Counsel for his defense."